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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 240.

FEDERAL TRADE COMMISSION, *Petitioner,*

vs.

ALGOMA LUMBER COMPANY, ET AL., *Respondents.*

BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION AND MOTION FOR LEAVE TO FILE ON BEHALF OF

Weyerhaeuser Sales Company, St. Paul, Minnesota,
Weyerhaeuser Timber Company, Klamath Falls, Oregon,
Madera Sugar Pine Company, Madera, California,
Yosemite Lumber Company, Pinedale, California,
Sugar Pine Lumber Company, Pinedale, California,
Northern Lumber Company, Cloquet, Minnesota,
Johnson-Wentworth Company, Cloquet, Minnesota,
Cloquet Lumber Company, Cloquet, Minnesota,
Boise-Payette Lumber Company, Boise, Idaho,
Bonners Ferry Lumber Company, Ltd., Bonners Ferry, Idaho,
Humbird Lumber Company, Sand Point, Idaho,
Potlatch Forests, Inc, Potlatch, Idaho,
Edward Rutledge Timber Company, Coeur d'Alene, Idaho,
Clearwater Timber Company, Lewiston, Idaho,
Winton Lumber Company, Gibbs, Idaho,
J. Neils Lumber Company, Libby, Montana,
Deer Park Lumber Company, Deer Park, Washington,
McGoldrick Lumber Company, Spokane, Washington,
Dalkena Lumber Company, Dalkena, Washington,
Cascade Lumber Company, Yakima, Washington,
Hallack & Howard Lumber Company, Denver, Colorado,
Edward Hines Lumber Co., Burns, Oregon,
Kalispell Lumber Company, Kalispell, Montana,
Kinzua Pine Mills Co., Kinzua, Oregon,
McCloud River Lumber Co., McCloud, California,
Michigan-California Lumber Co., Camino, California,
Polleys Lumber Co., Missoula, Montana,
Shevlin-Hixon Co., Bend, Oregon,
State Lumber Co., Columbia Falls, Montana,
H. E. Brown Timber Company, Sand Point, Idaho,
MacFarland-Brown Lumber Company, Sand Point, Idaho,
Craig Mountain Lumber Company, Winchester, Idaho,
Pondosa Pine Lumber Company, Elgin, Oregon,
Stoddard Lumber Company, Baker, Oregon,
Peshastin Lumber & Box Company, Peshastin, Washington,
Brooks Scanlon Lumber Company, Bend, Oregon,
Kellogg Lumber Company, Dishman, Washington,
Mt. Emily Lumber Company LaGrande, Oregon,
Atlas Tie Company, Coeur d'Alene, Idaho,
Somers Lumber Company, Somers, Montana,
Blackwell Lumber Company, Coeur d'Alene, Idaho,
Western Pine Manufacturing Company, Ltd, Spokane, Washington.

EDWARD S. ROGERS,
New York,
amicus curiae.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION.

Comes now Edward S. Rogers, a member of the Bar of this Court, as *amicus curiae* acting on behalf of the lumber companies named on the cover and moves the Court for leave to file the attached brief as *amicus curiae* under the following circumstances:

The undersigned is acting in this matter on behalf of forty-two lumber companies. These companies include some of the largest lumber interests in the United States.

A brief *amicus curiae* was filed in their behalf in Circuit Court of Appeals without objection, and on account of the great importance of the case to these companies they desire to file a brief as *amicus curiae* in this Court. On the assumption that no objection would be raised, since none was raised in the Circuit Court of Appeals, the undersigned as counsel prepared and printed the brief which is attached hereto, and obtained the consent of the Federal Trade Commission, Petitioner, to its filing. Counsel for Respondents, however, some time after a proof of Petition-

er's proposed brief had been delivered to them, refused to consent and objected to its being filed on the ground that it imposed an unnecessary burden upon the Respondents.

Under these circumstances, it is respectfully submitted that the Court should permit the attached brief to be filed. The forty-two lumber companies are vitally interested parties in the litigation and ordinarily would be actual parties to the suit if it arose under any other branch of the Federal Law, as for instance under the Interstate Commerce Act. They should, therefore, on principle and in fairness be allowed the small privilege of informing this Court of the nature and importance of the case and their interest in it, and offering the attached brief in support of the petition.

It may be noted that in many cases the government when asked to consent to a brief being filed by an *amicus curiae* has not given its consent but, not objecting to such filing, this Court upon an oral motion for leave to file has permitted the brief to be received. In addition it has been the uniform practice of this Court to allow the government and the Attorneys General of the various States to file briefs as *amici curiae* even where objection has been made by one of the parties, in order to allow the interest of the government or of the various States to be placed before the Court. It is submitted that in many cases the interest of the Federal Government, or of a State, is no more important than the interests of private parties where, as in the present instance, a class case is presented vitally involving a basic industry and with a large amount ultimately at stake.

Lastly, counsel respectfully suggests that while appearing at the instance of the lumber companies above referred to, he is still appearing as *amicus curiae,* to give such assistance to the Court as he may be able. It would seem that such possible assistance should not be refused because counsel for one of the parties does not desire the Court

to have it; it is suggested too that putting it in the power of opposing counsel to deny such possible assistance to the Court is not in accord with the traditional right of any person to offer any help, however slight, to aid the Court in its administration of justice.

Respectfully submitted,

EDWARD S. ROGERS, *amicus curiae*
acting on behalf of:

Weyerhaeuser Sales Company, St. Paul, Minnesota,
Weyerhaeuser Timber Company, Klamath Falls, Oregon,
Madera Sugar Pine Company, Madera, California,
Yosemite Lumber Company, Pinedale, California,
Sugar Pine Lumber Company, Pinedale, California,
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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION.

This brief is filed on behalf of a large number of producers of White Pine and Ponderosa Pine lumber who do not use trade designations which include the words "White Pine" except as applied to true White Pine. These parties are in competition with the respondents.

The unfair methods of competition which the Commission proceeded against in this case are of the same kind as those condemned by this court in *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483. There the act was the use of the terms "wool" and "merino" for products which were not wool. In this case respondents use a term which includes the words "White Pine", for lumber which is not White Pine.

The Commission, from the evidence, found as a fact that true White Pine lumber is useful for certain pur-

poses, has a good reputation, commands a ready sale and has and deserves public confidence. (Par. 17, R. 31.)

The Commission also found from the evidence that the respondents misapply a designation which includes the words "White Pine" to lumber cut from trees botanically of the Yellow Pine group. The scientific name of this tree is Pinus Ponderosa. Lumber from Pinus Ponderosa differs structurally and commercially from true White Pine. It is cheaper and not as good as true White Pine for many purposes. (Pars. 35-41, R. 34-36; Pars. 53-57, R. 37-38; Par. 61, R. 39.)

The Commission also found that substantial deception resulted from respondents' inclusion of the words "White Pine" in their trade term. (Par. 63, R. 39-40; Pars. 70-74, R. 41-42.)

The Commission followed the *Winsted* case, *supra*, and held respondents' acts to be unfair methods of competition. The Commission thereupon entered the cease and desist order which the Circuit Court of Appeals for the Ninth Circuit set aside (64 Fed. (2d) 618).

The testimony in this case, as in most cases where the meaning of words is in question, was not harmonious. The Commission considered the conflicting evidence and made eighty specific findings of facts. The Circuit Court of Appeals seems to have made its own analysis of the testimony and to have come to a different conclusion. In this, we think, it failed to observe the requirement of the statute, "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive." There is no doubt that the Commission's findings of fact were supported by testimony—we believe by a great preponderance. Indeed, it is not clear that the court disagreed with the specific findings of fact made by the Commission but apparently set aside its order because it differed

with the Commission's conclusion that the facts found were, as a matter of law, unfair methods. This aspect of the case is discussed in the brief filed on behalf of the Commission and raises an important question under the Federal Trade Commission Act.

In this brief, we wish to draw the court's attention to the effect which respondents' conduct has on their competitors. Those in whose behalf this brief is filed are competitors of respondents. They are in two categories: (1) producers of true White Pine lumber who use the designation "White Pine" truth fully and who are compelled to meet the competition of a different and cheaper lumber represented as White Pine; and (2) producers of lumber from Ponderosa Pine who sell it under names which truthfully represent it and do not apply to it designations which include the words "White Pine". These parties are compelled to compete with respondents who, by including the words "White Pine" in the name they apply to Ponderosa Pine are able to obtain a wider market for the same product.

Respondents' use of trade designations including the words White Pine gives them an unfair advantage in their competition both with the sellers of true White Pine and sellers of Ponderosa Pine. The false inclusion by respondents of the words White Pine in their designation of lumber which is not White Pine, either in scientific or in common understanding, must of necessity injure all competitors who truth fully use the description which respondents use untruthfully, as well as all those who sell the same lumber which respondents sell and will not apply a misleading description to it.

Respondents' misdescription injures the public by fostering the substitution of a wood unfit for many of the purposes for which White Pine is well known to be fit. The consumer is led by respondents' misuse of the words

"White Pine" into paying his money for that which he does not intend to buy and might not otherwise consider. Consumers who are thus misled are potential customers for the lumber sold by the parties on whose behalf this brief is filed. They are in the market ordering "White Pine" and expecting to get true White Pine which these parties mill and sell. Moreover, the misdescription as White Pine of Ponderosa Pine gives it a greater salability than if this wood were sold for what it is.

The misdescription which the court below permitted to continue cannot be employed without taking away an appreciable portion of their market from the competitors of the respondents who sell true White Pine and Ponderosa Pine and describe them truthfully.

It is, of course, not necessary to show specific instances of substitution and loss to producers of true White Pine where both are the plain consequences of the situation. It appears from this record that the custom of the retail trade is to a large extent one of substitution and passing off without the knowledge or consent of the buyer, and that the retailer is induced to this course by the fact that he buys the Ponderosa lumber under a trade term which includes the words "White Pine". The producers of true White Pine are thus deprived of a legitimate market and the public is being deceived by respondents' misdescription, into purchasing lumber not intended to be purchased and for uses for which it is not adapted. Respondents' use of a trade description which includes the words White Pine is the instrument of fraud which produces this result. This matter is of great importance to the producers of true White Pine, to the producers of Ponderosa Pine who sell it on its merits, and to the public.

That respondents' conduct is an unfair method of competition goes without saying. It is an artifice by which

one group of traders secure for themselves custom which, but for it, would come to another group. As Mr. Justice Holmes in *International News Service v. Associated Press,* 248 U. S. 215, said, p. 246:

> "If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned. The ordinary case is a representation by device, appearance, or other indirection that the defendant's goods come from the plaintiff. But the only reason why it is actionable to make such a representation is that it tends to give the defendant an advantage in his competition with the plaintiff and that it is thought undesirable that an advantage should be gained in that way."

No one would have any complaint if the producers of Ponderosa Pine should compare it with White Pine and point out the good qualities which Ponderosa admittedly has, its usefulness for interior trim, its abundance, its moderate price. In short, an effort to sell this wood on its merits, under its own proper name, would be commendable and fair competition but to disguise it under the name of another wood is unfair and we should suppose, unlawful. As early as 1846, Senator Lott in *Taylor v. Carpenter,* 11 Paige, 292, 2 Sand., Ch. 603, remarked:

> "A disguise is not usually assumed for an honest object. It is a mark more characteristic of deception and fraud. It defeats the very end and object contemplated by legitimate competition, the choice to the public to select between the articles exposed to sale."

While in this case, as was found, the term "California

White Pine" may have been originally used to distinguish Ponderosa Pine from Southern Yellow Pine, the respondents now desire to perpetuate the term in order to enjoy the resulting identification of their lumber in the public mind with true White Pine, and the larger profit which admittedly accrues to them from the use of the words "White Pine." While the original use of the term may have been innocent, continuation after attention had been called to the confusion it was producing is fraudulent and unfair.

In *Cochrane v. McNish* (1896), A. C. 225, 13 R. P. C., 100, 107, Lord Morris said:

> "The respondents erred unwittingly at first. But as they persisted in their error after their attention was called to the fact that they were infringing the appellant's rights, their conduct, in the eye of the law, amounts to fraud, and they must be held responsible for the consequences."

In *Huntley & Palmer v. Reading Biscuit Co.*, 10 R. P. C., 277, 280, Mr. Justice Chitty said:

> "Again, the defendants set up by their counsel, and they set up on the affidavits that they did not mean anything wrong, and their intentions were fair and proper at the time. I need not refer to what Lord Justice James has said on this matter in *Hendriks v. Montagu*, L. R., 17 Ch. D., 638, p. 646, as to stealing a plaintiff's name, and as to its being a defendant's persistence, after his attention has been called to his use of the plaintiff's name, that justifies the court in using a harsh term."

That a deceptive practice has been going on for some time is an added reason why it should be stopped, not continued. The test is not how long a misrepresentation may have been used but whether it still deceives.

The undersigned desire to make it plain to the court that they regard respondents' actions an unfair method of competition which is injurious to them. It is urged

therefore, that the court grant the writ and review the decision of the Circuit Court of Appeals of the Ninth Circuit.

Respectfully submitted,

EDWARD S. ROGERS, *amicus curiae*
acting on behalf of:

Weyerhaeuser Sales Company, St. Paul, Minnesota,
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